In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-888

CHARLES E. SELLERS, JR., AND CHARLES SEXTON, PETITIONERS

v.

UNITED STATES OF AMERICA

No. 73-889

CHARLES H. CARR, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners challenge their convictions on the ground that evidence produced at trial was obtained through execution of an invalid search warrant. The petitioner in No. 73-889 additionally contends that the government failed to prove use of the telephone for "transmission" of wagering information.

After a jury trial in the United States District Court for the Middle District of Alabama, petitioners were

convicted of use of a wire communication facility for the transmission in interstate commerce of wagering information, in violation of 18 U.S.C. 1084(a). Petitioners Sellers and Sexton were sentenced to two years' imprisonment; petitioner Carr was sentenced to three years' imprisonment and was fined $10,000. The court of appeals affirmed, *United States* v. *Sellers et al.*, 483 F. 2d 37 (C.A.5); S.S. Pet. App. A; C. Pet. App. I.[1]

1. Petitioners contend that the district court erred in denying their pretrial motion to suppress evidence obtained as a result of the execution of a search warrant because the warrant was issued without a sufficient showing of probable cause. They argue that the warrant did not comply with the standards set out by this Court in *Aguilar* v. *Texas*, 378 U.S. 108, and *Spinelli* v. *United States*, 393 U.S. 410. In large measure these contentions are answered by the opinion of the court below. We add the following additional comment.

In *Aguilar, supra*, this Court held that an affidavit in support of a search warrant in which merely conclusory allegations of wrongdoing were set forth, was insufficient to satisfy the dictates of the Fourth Amendment.[2] Two grounds of invalidity were enumer-

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[1]"S.S. Pet." denotes the petition for a writ of certiorari in No. 73-888; "C. Pet." denotes the petition in No. 73-889.

[2]In pertinent part the deficient affidavit read (378 U.S. at 109):

> Affiants have received reliable information from a credible person and do believe that heroin, marijuana, barbiturates and other narcotics and narcoitc paraphernalia are being kept at the above described premises for the purposes of sale and use contrary to the provisions of the law.

ated: first, the affidavit failed to indicate a basis upon which the magistrate could independently judge the informant's credibility and reliability;[3] second, the affidavit failed to specify the "underlying circumstances" indicating the means by which the information was acquired. Since the affidavit placed before the magistrate merely the officer's conclusions, rather than the facts upon which he formed such conclusions, the magistrate "could not 'judge for himself the persuasiveness of the facts relied on * * * to show probable cause' " and therefore must have "accepted 'without question' the informant's 'suspicion,' 'belief' or mere conclusion.' " 378 U.S. at 114.

In *Spinelli,* this Court recognized that an affidavit that describes the criminal activity in such detail that the magistrate knows the informant "is relying on something more substantial than a casual rumor circulating in the underworld or an accusation based merely on an individual's general reputation," 393 U.S. at 416, is one that fairly permits the magistrate to infer that the information was obtained in a reliable manner. In the instant case, the affiant did not merely recite conclusory allegations of illegal activity. Instead, he described the *modus operandi* of the criminal enterprise, named the persons involved and delineated their specific functions, and indicated specifically the assigned numbers and locations of the telephones used in furtherance of the gambling enterprise.[4] From this array of detailed factual informa-

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[3]Petitioners do not challenge the instant affidavit's demonstration of the reliability and credibility of the informant. The affidavit stated that the informant had furnished reliable information in more than one hundred instances in matters under investigation. He was in fact a Special Agent of the Federal Bureau of Investigation.

[4]In particular, the detailed information as to the numbers, locations, and use of the telephones for frequent long distance calls to known gamblers shows that such information was gathered either by personal observation or by examination of telephone company records.

tion, the magistrate could reasonably conclude that the informant must have had recent direct knowledge of the criminal activity.[5] *Spinelli* v. *United States, supra; United States* v. *Harris,* 403 U.S. 573, 581; cf. *Draper* v. *United States,* 358 U.S. 307.

Moreover, the affiant's knowledge of petitioner Sellers' reputation as a bookmaker furnished added information upon which the magistrate could conclude that probable cause existed for the issuance of a search warrant. As this Court stated in *United States* v. *Harris, supra,* 403 U.S. at 583:

> We cannot conclude that a policeman's knowledge of a suspect's reputation * * * is not a "practical consideration of everyday life" upon which an officer (or a magistrate) may properly rely in assessing the reliability of an informant's tip. To the extent that *Spinelli* prohibits the use of such probative information, it has no support in our prior cases, logic, or experience and we decline to apply it to preclude a magistrate from relying on a law enforcement officer's knowledge of a suspect's reputation.

2. While admitting to having engaged in the business of betting or wagering, petitioner Carr contends that the government failed to prove knowing use of the telephone for the "transmission" in interstate commerce of wager-

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[5]Petitioners contend that the affidavit is defective because it contains no references to specific telephone calls (C. Pet. 14; S.S. Pet. 13). But proof of a violation of 18 U.S.C. 1084(a) requires a demonstration that the defendant is engaged in the business of betting or wagering, not that any particular phone call has been made. *United States* v. *Acarino,* 408 F. 2d 512 (C.A. 2), upon which petitioners Sellers and Sexton rely, involved the sale of narcotics, which is *per se* unlawful. In contrast, the proscribed act here—using an interstate wire communication facility—is unlawful only when used in furtherance of a gambling enterprise.

ing information, citing *Telephone News System, Inc.* v. *Illinois Bell Telephone Company,* 220 F. Supp. 621 (N.D. Ill.) (three-judge court), affirmed *per curiam,* 376 U.S. 782. That case involved the mandatory discontinuance of telephone service under 18 U.S.C. 1084(d) to plaintiff news agency, which was furnishing recorded sports results to persons who dialed its telephone number. The statute required disconnection of telephone service to persons whose facilities are being used for interstate transmission or receipt of gambling information "in violation of Federal, State, or local law." While resting its dismissal of the news service's complaint on the ground that its facility operated contrary to state law,[6] the court, in dictum, rejected an alternative argument that receipt by telephone of the sports information by professional gamblers violated 18 U.S.C. 1084(a), stating that "transmission" in subsection (a) means "sending," not "sending or receiving."

Regardless of the validity of that dictum as applied to the facts of that case, the facts in the instant case are significantly different. In *Telephone News System,* the gamblers who listened to the recorded information could not have been found to have been sending information in such calls. Similarly, in *United States* v. *Stonehouse,* 452 F. 2d 455 (C.A. 7), involving the use of a ticker tape machine for receipt of gambling information, no possibility existed that the device was also used by the recipients to send wagering information. In the instant case, by contrast, the evidence showed that the telephones were used for conventional two-way voice com-

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[6]Section 28-1(a)(10) of the Illinois Criminal Code proscribed the knowing transmission of "information as to wagers, betting odds, or changes in betting odds by telephone, telegraph, radio, semaphore or similar means," or installing or maintaining equipment for such purposes.

munication. Thus, as the court below indicated, the only reasonable conclusion is that petitioners used the telephone for the exchange of wagering information (C. Pet. App. A-15). Such use plainly violates Section 1084(a). *Sagansky* v. *United States,* 358 F. 2d 195 (C.A. 1), certiorari denied, 385 U.S. 816; *United States* v. *Tomeo,* 459 F. 2d 445 (C.A. 10).

It is therefore respectfully submitted that the petitions for writs of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

MAY 1974.